Mark L. Venardi (SBN 173140)
THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Two Ygnacio Center
Walnut Creek, California 94596
Telephone: (925) 937-3900
Facsimile: (925) 937-3905

Attorneys for Plaintiff
TIM GALLI

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

TIM GALLI, Plaintiff, vs. PITTSBURG UNIFIED SCHOOL DISTRICT, BARBARA WILSON AND PERCY MCGEE, Defendants.	CASE NO: 3:09-cv-03775-JSW **PLAINTIFF'S MOTION FOR ADMINSTRATIVE RELIEF TO CONDUCT ADDITONAL DISCOVERY WITH RESPECT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DUE PROCESS** Filed concurrently with: 1) SUPPORTING DECLARATION OF MARK L. VENARDI; and 2) [PROPOSED] ORDER

Plaintiff, Tim Galli, respectfully moves this court for administrative relief under Local Rule 7-11, seeking an order pursuant to Fed. R. Civ. P. 56(d)(2) allowing Plaintiff additional time to obtain declarations or to conduct additional discovery with respect to Defendants' motion for summary judgment ("MSJ") as to the due process issue.

I. Background

Plaintiff seeks leave to conclude discovery with respect to his subpoenas issued to RGM and Associates ("RGM"), Ralph Caputo and Merrill Lynch ("third parties"). The discovery will provide information regarding: (1) Percy McGee's financial relationship with Dr. Barbara Wilson, RGM, and Caputo and (2) McGee's alleged bias when he voted to take action against Plaintiff.

The parties were ordered to re-brief Defendants' MSJ on the due process issue. Defendants are to move by June 3, 2011 and Plaintiff's Opposition is due by June 17, 2011. (Doc. No. 98, May 17, 2011 Order.) No new trial date is currently set. (Doc. No. 99, May 18, 2011 Clerk Order.)

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

Plaintiff alleges Defendants violated his due process rights when McGee voted to suspend and terminate Galli from his employment because McGee was biased due to his financial relationship with RGM, a PUSD contractor, RGM's president Caputo, and Dr. Wilson. (FAC, pp. 24-29; 25:21-25.) Defendants allege they took action due to an incident where Plaintiff urinated on the car of RGM employee Gino Elliot. (Doc. No. 81, MSJ, pp. 20:14-22 – 21:1-15.) At the time McGee voted, he was employed as a financial planner at Merrill Lynch and managed investment accounts for RGM, Caputo and Dr. Wilson. Defendants' MSJ alleges McGee was not biased and had no financial conflict. (MSJ, pp. 21-24.)

Plaintiff issued subpoenas to the third-parties to discover facts related to McGee's bias, which are essential to Plaintiff's opposition to Defendants' MSJ. Because of numerous meet and confer discussions with RGM's and Caputo's attorney, Plaintiff had a good faith belief that the third-parties would comply with the subpoena. To date, Plaintiff has yet to receive discovery responses from the third-parties.

Plaintiff first issued his subpoenas to the third-parties in August 2010. (Doc. No. 100, Declaration of Brian A. Noble in Support of Motion of RGM & Associates and Ralph Caputo to Quash the Deposition Subpoena for Testimony And Product of Business Records ("Noble Declaration"), Exhibit A, pp. 14-18; Merrill Lynch subpoena attached as Exhibit A to Declaration of Mark Venardi in Support of Plaintiff's Motion For Administrative Relief To Conduct Additional Discovery With Respect To Defendants' Motion For Summary Judgment ("Venardi Declaration").)

The history of Plaintiff's RGM's and Caputo's meet and confer conferences regarding these subpoenas are summarized in the parties' correspondence and e-mail communications. (See, Noble Declaration, Exhibit B, pp. 19-36; Venardi Declaration, Exhibit B, 16-17.)

As a result of the meet on confer conferences, on January 20, 2011, Plaintiff issued new subpoenas to the third parties. (January 20, 2011 subpoenas to RGM, Caputo and Merrill Lynch, attached as Exhibits C, pp. 38-40, Exhibit D, pp. 42-44 to Noble Declaration and Exhibit C to Venardi Declaration, respectively.) The parties conducted further meet and confer and conferences, which Plaintiff believed would lead to the production of the subpoenaed documents. (E-mail correspondence, Venardi Declaration, Exhibit B, pp. 1-16.) On May 12, 2011, Plaintiff informed

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

RGM's and Caputo's attorney that due to the delay in resolving the issues, he would be sending a joint letter regarding the discovery dispute. (May 14, 2011 e-mail, attached as Exhibit B to Venardi Declaration, p. 1.)

RGM's and Caputo's objections also prevented Plaintiff from receiving the subpoenaed documents from Merrill Lynch. (See Noble Declaration, Exhibit F, pp. 35, 50.) After several meet and confer discussions with Merrill Lynch's attorney, Plaintiff was informed Merrill Lynch would be withholding its subpoena production because RGM, Caputo and Dr. Wilson objected. (Venardi Declaration, ¶ 5). Neither Merrill Lynch, nor Dr. Wilson issued written objections to the subpoenas. (Venardi Declaration, ¶ 6).

On May 20, 2011, Plaintiff served all interested parties with Plaintiff's portion of a joint statement of the discovery dispute regarding the subpoenas issued. (May 20, 2011 letter attached, Exhibit D to Venardi Declaration) The parties have completed their arguments and once signatures are finalized, the joint statement of discovery dispute will be filed. On May 20, 2011, RGM and Caputo filed a motion to quash the RGM and Caputo subpoenas. (Doc. No. 100, RGM and Caputo Motion to Quash.)

II. ARGUMENT

Rule 56(d) provides a device for litigants to avoid summary judgment when the non-movant needs to discover affirmative evidence necessary to oppose the motion. *See Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir.1987). Specifically, Rule 56(d) provides that if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion or allow the taking of additional discovery. The requesting party must show: (1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

The documents subpoenaed from Merrill Lynch will lead to existing facts regarding McGee's and Dr. Wilson's financial relationship (Venardi Declaration, ¶ 7) because Defendants admit Dr. Wilson was McGee's client. (Defendants' Amended Responses to Plaintiff's First Set of

Requests for Admissions ("DARPRA"), Nos. 61, 62, attached as Exhibit E to Declaration of Mark Venardi.) Defendants further admit the financial relationship created a pecuniary interest for McGee. (DARPA, No. 69.) Furthermore, McGee admitted that in 2008 the amount of his earnings from his management of Dr. Wilson's accounts was between $2,000.00 and $5,000.00. (Deposition of Percy McGee, 127:12-20, attached as Exhibit F to Venardi Declaration.) Plaintiff believes that the subpoenaed records are essential to his opposition to Defendants' MSJ on the due process issue because they will provide the actual value of Dr. Wilson's financial accounts and the amount of earnings McGee received for his management. (Venardi Declaration, ¶ 9.)

The documents subpoenaed from RGM, Caputo and Merrill Lynch will lead to existing facts regarding McGee's financial relationship with RGM and Caputo (Venardi Declaration, ¶ 7) because McGee admitted that RGM and Caputo were his clients. (McGee Depo., 115:2-4.) McGee also admitted that in 2009 he personally earned between $2,000 and $5,000 for his management of the RGM account (McGee Depo., 122:2-5, 9-14) and between $5,000 and $10,000 for his management of the Caputo account. (McGee Depo., 122:10-14.) McGee further admitted that he discontinued his financial relationship with RGM and Caputo because he was advised by an attorney that because RGM was a contractor for PUSD, there was a conflict. (McGee Depo., 110:14-22.) Plaintiff believes that the records subpoenaed are essential to his opposition to Defendants' MSJ on the due process issue because they will provide information regarding the value of the financial accounts that McGee managed for RGM and Caputo and the amount of earnings he received for his management. (Venardi Declaration, ¶ 10.)

Plaintiff also believes that the subpoenaed documents are essential to his opposition to Defendants' MSJ on the due process issues because they will demonstrate that McGee had a conflict of interest, and thus was biased, when he voted to take action against Plaintiff. (Venardi Declaration, ¶ 11.) A decision maker who stands to gain or lose from a decision is clearly disqualified from acting as a decision maker. See *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1235 (2000). Plaintiff has alleged that in order to maintain his financial relationship, McGee had an interest in voting in favor of Dr. Wilson's recommendation and taking action against Plaintiff for the incident involving an RGM employee.

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

Plaintiff also believes that the subpoenaed documents are essential to his opposition to Defendants' MSJ because they may demonstrate that McGee violated the Political Reform Act ("PRA") and related regulations when he voted to take action against Plaintiff. (Venardi Declaration, ¶ 12.) The PFA provides that, "a public official has a financial interest in a decision…if it is reasonably foreseeable that the decision will have a material financial effect…on any source of income… of $500.00 or more…received by the public official within 12 months prior to the time when a decision is made." CA Govt. § 87103. The California Fair Trade Practices Commission ("CFTPC") has also promulgated similar conflict of interest regulations. See Cal. Code Regs. tit. 2, §§ 18700, 18703.3.

Plaintiff believes the subpoenaed documents are critical to his opposition to summary judgment because they may demonstrate that under the PRA and the related regulations, McGee had a financial interest, and would have been biased, in voting to suspend and recommend Plaintiff for termination. McGee has already testified that he believed that he earned over $500.00 in income his management of the Dr. Wilson, RGM and Caputo accounts. McGee also admitted he had concerns relative to the CFTPC. (McGee Depo., 137:4-6.) Specifically, McGee was concerned that, "[i]f he had anything with any type of conflict, then from that you shouldn't make any decisions on that same particular issue for a 12-month period." (McGee Depo., 138:18-21.)

As a result of the aforesaid facts and good faith beliefs, the records from RGM, Caputo and Merrill Lynch are essential to justify Plaintiff's opposition to Defendants' motion for summary judgment on the due process issue.

II. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this court grant administrative relief pursuant to Local Rule 7-11 and allow Plaintiff additional time to complete discovery regarding his subpoenas issued to RGM and Associates, Ralph Caputo and Merrill Lynch.

Dated: June 2, 2011

THE VENARDI LAW FIRM

/s/ Mark Venardi
Mark L. Venardi
Attorneys for Plaintiff Tim Galli

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was served via ECF, this 2nd day of June, 2011, upon:

Roy A. Combs, Esq.
Joshua A. Stevens, Esq.
Fagen Friedman & Fulfrost, LLP
70 Washington Street
Suite 205
Oakland, CA 94607

THE VENARDI LAW FIRM

_/s/ Mark Venardi__________
Mark L. Venardi

Attorneys for Plaintiff TIM GALLI

Mark L. Venardi (SBN 173140)
THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Two Ygnacio Center
Walnut Creek, California 94596
Telephone: (925) 937-3900
Facsimile: (925) 937-3905

Attorneys for Plaintiff
TIM GALLI

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

TIM GALLI, Plaintiff, vs. PITTSBURG UNIFIED SCHOOL DISTRICT, BARBARA WILSON AND PERCY MCGEE, Defendants.	CASE NO: 3:09-cv-03775-JSW **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PROPOSED ADMINISTRATIVE RELIEF**

The Court having considered the Plaintiff, Tim Galli's, motion for administrative relief with regard to allowing Plaintiff additional time to obtain declarations or to conduct additional discovery with respect to Defendants' motion for summary judgment as to the due process issue, and all papers filed by the parties in connection therewith, and the Court further having considered the arguments of counsel for and against the motion, hereby orders that:

(a) plaintiff is granted to leave to conduct additional discovery with respect his subpoenas issued to RGM and Associates, Ralph Caputo and Merrill Lynch, pending this Court's rulings with respect to: (1) the parties' joint statement of the discovery dispute regarding Plaintiff's subpoenas issued to RGM and Associates, Ralph Caputo and Merrill Lynch and (2) RGM and Associates and Ralph Caputo's motion to quash; and

(b) the court will provide new dates for the filing of Plaintiff's opposition and defendants reply to Defendants' motion for summary judgment as to the due process issue subsequent to this Court's rulings with respect to: (1) the parties' joint statement of the discovery dispute regarding Plaintiff's subpoenas issued to RGM and Associates, Ralph Caputo and Merrill Lynch and RGM and (2) Associates and Ralph Caputo's motion to quash.

DATED: ____________________

____

Hon. Jeffrey S. White

UNITED STATES DISTRICT JUDGE

THE VENARDI LAW FIRM
2033 North Main Street, Suite 750
Walnut Creek, CA 94596
Tel: (925) 937-3900
Fax: (925) 937-3905